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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10

11 UNITED STATES OF AMERICA

No. CR13 0764 WHO

12 Plaintiff,

**NOTICE OF MOTION AND MOTION
TO SUPPRESS TELEPHONE DATA**

13 v.

14 ESAU FERDINAND,

Date: October 15, 2015

Time: 9:00 a.m.

Crtrm.: Honorable William H. Orrick

15 Defendant.
16 _____/

17 **TO: THE UNITED STATES DISTRICT COURT; ASSISTANT UNITED STATES**
18 **ATTORNEYS WILLIAM FRENTZEN AND DAMALI TAYLOR; AND TO THE**
19 **CLERK OF THE ABOVE ENTITLED COURT:**

20 **PLEASE TAKE NOTICE** that on October 15, 2015, at 9:00 a.m., or as soon thereafter
21 as this motion may be heard in the above-referenced Court, Defendant Esau Ferdinand, by and
22 through his attorney, Robert Waggener, will move this Court for an Order suppressing telephone
23 data obtained from the cell phone of defendant Esau Ferdinand on October 25, 2011.

24 This motion is made on the grounds that the aforementioned telephone data was obtained
25 without a warrant in violation of the Fourth Amendment of the United States Constitution.
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1 This motion is brought pursuant to Rules 12(b)(3)(C) and 41(h) of the Federal Rules of
2 Criminal Procedure.

3 This motion is based on this Notice, the attached Memorandum of Points and Authorities,
4 the accompanying declaration of counsel, the records and files in this action, all applicable law,
5 and on such further pleadings and arguments as may be presented before and at the hearing of
6 this matter.

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8 Dated: September 17, 2015

Respectfully submitted,

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10 /s/
11 ROBERT WAGGENER
12 Attorney for Defendant
13 ESAU FERDINAND
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **STATEMENT OF THE CASE AND INTRODUCTION**

4 A Second Superseding Indictment filed on April 14, 2014 charges 11 defendants and 22
 5 counts. Defendant Esau Ferdinand is charged in Counts One (conspiracy to conduct the affairs of
 6 an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d)), and
 7 Counts Twelve through Fifteen. (alleging acts carried out on April 3, 2011; (Attempted Murder
 8 in Aid of Racketeering (18 U.S.C. § 1959(a)(5)); Assault with a Dangerous Weapon in Aid of
 9 Racketeering (18 U.S.C. § 1959 (a)(3); Maiming in Aid of Racketeering (18 U.S.C. § 1959(a)(2);
 10 and use/Discharge of a Firearm in Furtherance of a Crime (18 U.S.C. § 924 (c)(1)(a)). All the
 11 defendants in the case are alleged to be members or associates of the Central Divisadero Players
 12 violent street gang, also known as the “CDP” gang. The Second Superseding Indictment also
 13 contains a notice of sentencing factors as to Count One. The notice alleges that Ferdinand and
 14 the other defendants agreed to commit the murder of actual and suspected rival gang members,
 15 persons suspected of cooperating with law enforcement, and persons who defied the will of the
 16 CDP.

17 This motion challenges a phone dump of the data content of Esau Ferdinand’s cell phone
 18 on October 25, 2011, hours after he was arrested by the San Francisco Police Department. There
 19 is no indication that the search of the phone was pursuant to a warrant and no warrant has been
 20 produced in the discovery in this case.

21 **II.**

22 **STATEMENT OF RELEVANT FACTS**

23 Defendant Esau Ferdinand was arrested by officers of the San Francisco Police
 24 Department on October 25, 2011 pursuant to outstanding arrest warrants. The incident report
 25 referencing Ferdinand’s arrest and being held in custody at Southern Police Station (BG005730)
 26 reports the time of the occurrence as 1:30 p.m. When he was arrested, Mr. Ferdinand was in
 27 possession of a cell phone.
 28

1 Within the discovery produced in this case is a 140 page download of the contents of
 2 “Ferdinand’s Telephone”, a UFED Samsung CDMA SCH-R380 (MetroPCS). (BG005840-6180;
 3 See Also BG080255-06)) The report is dated Tuesday, October 25, 2011 4:08 p.m..¹ The report
 4 contains 139 Contacts, over 600 Phone SMS-Text Messages, over 275 Images, and incoming and
 5 outgoing call information. The government has not produced any search warrant for the contents
 6 of Mr. Ferdinand’s phone.

7 8 ARGUMENT

9 I.

10 THE WARRANTLESS SEIZURE OF THE DEFENDANT’S CELL PHONE 11 DATA WAS ILLEGAL

12 In *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473 (2014), the Supreme Court
 13 addressed whether the police may, without a warrant, search digital information on a cellphone
 14 seized from an individual who has been arrested. *Riley*, 134 S. Ct. at 2480. The *Riley* Court
 15 emphasized that the issue before the Court concerned “the reasonableness of a warrantless search
 16 incident to a lawful arrest.” *Id.* at 2482. Hence, the Supreme Court reviewed three cases that
 17 addressed searches incident to arrest, *Chimel v. California*, 395 U.S. 752 (1969), *United States v.*
 18 *Robinson*, 414 U.S. 218 (1973), and *Arizona v. Gant*, 556 U.S. 332 (2009), and explained this
 19 “search incident to arrest trilogy.” *Id.* at 2484. In this case, law enforcement searched Mr.
 20 Ferdinand’s cellphone after seizing it from his person during arrest, so *Riley* clearly applies.

21 The *Riley* Court addressed whether the search incident to arrest exception applies to the
 22 search of a cellphone. *Riley*, 134 S. Ct. at 2482 (“[I]t has been well accepted that [a search
 23 incident to arrest] constitutes an exception to the warrant requirement”). The Court in *Riley*
 24 declared unwarranted cellphone searches incident to arrest to be an unconstitutional infringement
 25 of Fourth Amendment rights. *Id.* at 2480-95. The Court balanced the right of privacy underlying
 26 the warrant requirement against countervailing governmental interests, such as officer safety and
 27 prevention of evidence destruction, and concluded that the “answer to the question of what police

28 ¹ The report indicates the “Extraction start date/time” to be 10/25/11 15:56:17.

1 must do before searching a cell phone seized incident to an arrest is accordingly simple - get a
2 warrant.” *Id.* at 2495.

3 Here, the government has not produced any warrant to justify the seizure of the data
4 contained on Mr. Ferdinand’s phone.² The phone dump that took place hours after Mr.
5 Ferdinand’s arrest was illegal.

6 **CONCLUSION**

7 For the foregoing reasons, Defendant Ferdinand’s telephone data seized on October 25,
8 2011 should be suppressed.

9
10 Dated: September 17, 2015

Respectfully submitted,

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12 /s/
13 ROBERT WAGGENER
14 Attorney for Defendant
15 ESAU FERDINAND
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25 ² It is to be noted that a State of California search warrant for the detail records of a
26 phone number believed to be used by Esau Ferdinand (650-754-3323) has been produced by the
27 government in this case. (BG080256) However, the affidavit in support of the warrant has not yet
28 been produced, and the defense is waiting for a response to the discovery request for the
affidavit. The warrant was issued by a San Francisco Superior Court Magistrate on April 18,
2011 and was for detail records between October 25, 2010 and December 6, 2010 (a time period
surrounding the Jelvon Helton homicide).